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No. 86-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Conditional Cross-Petitioners,

v.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Conditional Cross-Petitioners have opposed the Petition for Certiorari to the Eighth Circuit prior to judgment in *Hodgson, et al. v. State of Minnesota, et al.*, (S. Ct. No. 86-882). If, and only if, certiorari is granted in that case prior to judgment in the Eighth Circuit, Conditional Cross-Petitioners seek review prior to judgment of all the issues now properly pending before the Court of Appeals to include:

1. May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor woman under the age of 18 at least 48 hours before performing an abortion upon their daughter?

2. May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor woman under the age of 18 at least 48 hours before performing an abortion if the notice requirement may be avoided by a court bypass system which both on its face and in actual practice meets the standards set forth by this Court for more burdensome parental consent statutes?

3. If the requirement that both parents be notified absent a judicial determination renders the Minnesota statute unconstitutional, is that requirement severable from the remainder of the statute as was clearly intended by the legislature?

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OPINION BELOW

The opinion below is set forth at pp. 34a-137a of the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in *Hodgson, et al. v. State of Minnesota, et al.*, S. Ct. No. 86-882. (Hereinafter the petition documents in that case are referred to as "Hodgson Petition" and "Hodgson Appendix".)

JURISDICTION

Jurisdiction has been asserted in *Hodgson, et al. v. State of Minnesota, et al.*, S. Ct. No. 86-882, pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Minnesota Statutes § 144.343 (2)-(7) at issue in this case is reprinted in full in the Hodgson Appendix. (142a-151a.)

STATEMENT OF THE CASE

The Statement of the Case in this matter is generally set forth in the Hodgson Petition at 2-4 and in the Brief in Opposition to the Petition for Certiorari filed in *Hodgson, et al. v. State of Minnesota, et al.*, S. Ct. No. 86-882.

REASONS FOR GRANTING THE WRIT

I. IF A PRE-JUDGMENT WRIT IS TO BE GRANTED, THE DEFENDANTS ARE ENTITLED TO FULL CONSIDERATION OF ALL ISSUES RAISED BY THEM ON APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS.

As demonstrated in the Defendants'[1] Brief in Opposition to the Hodgson Petition, this case does not satisfy the criteria established by this Court for granting extraordinary certiorari prior to judgment.

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[1] For the sake of convenience and uniformity with the documents filed in case no. 86-882, the parties will be denominated with reference to their posture in the district court where respondents Hodgson, *et al.* were Plaintiffs and the State, *et al.* Defendants.

If the Court, however, determines to grant the writ on petition of the Plaintiffs who prevailed in the district court below, Defendants must be entitled to full consideration of the issues they have raised on appeal to the circuit court. To wit:

1. May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor woman under the age of 18 at least 48 hours before performing an abortion upon their daughter?

2. May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor woman under the age of 18 at least 48 hours before performing an abortion if the notice requirement may be avoided by a court bypass system which both on its face and in actual practice meets the standards set forth by this Court for more burdensome parental consent statutes?

3. If the requirement that both parents be notified absent a judicial determination renders the Minnesota statute unconstitutional, is that requirement severable from the remainder of the statute as was clearly intended by the legislature?

This is not a cross-petition of sort by which the prevailing party below seeks review of an adverse determination not controlling the lower court result. In this instance, the cross-petitioners did not prevail in the district court judgment and have appealed to the circuit court, as is their right. Here it is the prevailing parties below who would, by seeking certiorari before judgment, both frustrate Defendants' pursuit of the normal appellate process and Defendants' right to frame the issues upon which they require appellate review.

In the opinion of the Defendants, the issues to be reviewed as set forth in the Hodgson Petition do not fully encompass the issues on appeal of Defendants to the circuit court. This is particularly true to the extent that those issues relate to the constitutional necessity of a judicial bypass to a parent notification requirement generally and the effect of such a bypass option upon the fulfillment of legitimate public purposes to be served by providing for parent notification.

If Plaintiffs' petition is granted and this cross-petition were, then, denied, Defendants may be wholly deprived of their right to seek judicial review of adverse decisions by the district court upon certain issues. In the alternative there would result a serious detriment to the interests of judicial economy if the Court were to determine only the issues as framed by the Plaintiffs below leaving issues yet to be determined by the court of appeals and possible later consideration by this Court.

II. THE DISTRICT COURT ERRED IN HOLDING THAT A STATE MAY NOT CONSTITUTIONALLY REQUIRE A PHYSICIAN TO ATTEMPT WITH REASONABLE DILIGENCE TO NOTIFY THE PARENTS OF AN UNEMANCIPATED MINOR WOMAN UNDER THE AGE OF 18 AT LEAST 48 HOURS BEFORE PERFORMING AN ABORTION UPON THEIR DAUGHTER.

As has been recognized by this Court in numerous prior decisions, issues concerning abortions upon minors do not involve simply a constitutional right of a person to obtain an abortion as balanced against the state's authority to regulate abortion generally. Also strongly present is the legitimate goal of the state in the protection of minors in crisis and recognition of the essential guiding role of parents in the care and

upbringing of children. *See, e.g., Bellotti v. Baird,* 443 U.S. 622, 634-37 (1979) (Bellotti II).

This Court has concluded that these interests are not sufficiently strong to permit parents an absolute veto over a minor's abortion decision. *Id.* at 643; *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 75 (1976). However, a statute which only requires parental notice presents substantially different questions from those involved where parental consent is to be required. Providing merely for parental notice gives no one the legal power of veto over the abortion decision. Rather it merely permits an opportunity for parental care and involvement, not only in the abortion decision process itself,[2] but also in addressing the related problems of youthful sexual activity and pregnancy. To deny notice, however, virtually assures that no such opportunity will exist in many cases.

As was observed by Justice Powell concurring in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 91 (1976) and reiterated in *H.L. v. Matheson,* 450 U.S. 398, 409-10 (1981):

> [The decision whether or not to bear a child] is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the at-

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[2] Plaintiffs' own evidence portrays confused, frightened minors, some as young as 13, who, without parental involvement, are moved toward the court bypass procedure upon the representations that "[j]ust because they had gone to court didn't mean they had to have an abortion."

See, e.g., Testimony of Cynthia Daley and of Paula Wendt, Hodgson Appendix at 153a; 182a. These portrayals, in themselves, point up a need for at least the opportunity for parental involvement.

> tending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

Indeed, as indicated by the trial court, abortion providers rarely if ever decline to perform, without parental notice, an abortion on a minor they believe to be "immature."[3] The entire tenor of the proposition that parents should be denied notice suggests a predisposition favoring abortion which fails to recognize the observation in *Bellotti II* that:

> Yet, an abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests.

443 U.S. at 642-43.

Furthermore, it is clear that a minor may be sufficiently "mature" to make the specific decision to abort but not sufficiently "mature" to face the abortion process and aftercare needs all alone, or to deal with all the underlying factors precipitating the need for abortion.[4]

Closely related to the proper interest of the state in safeguarding the care and decision-making process of minors in crisis situations is the right of parents to raise their minor

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[3] *See, e.g.*, Findings of Fact, Conclusions of Law and Order of Alsop, J., dated November 18, 1986 (hereinafter "Final Order"). Hodgson Appendix at 110a.

[4] It appears that the concerns related to youthful sexual activity of at least some abortion providers who "counsel" many pregnant minors focus largely on the fact that they "aren't very good contraceptors yet." *See* Testimony of Paula Wendt, Hodgson Appendix at 181a.

children and participate in the conduct of their lives. This right has been held to flow from the same constitutional source as the rights associated with the abortion decision. *See, e.g., Roe v. Wade,* 410 U.S. 113, 153 (1973); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

It may well be wise to conclude that the balance between these rights should not be struck in favor of authorizing parental veto of the abortion decision. However, the most basic and minimal provision which may be made for the protection of any right is entitlement to notice and an opportunity to be heard where that right is to be jeopardized. To eliminate the general right to notice and to authorize, by dint of constitutional mandate, either the abortion provider or a judge upon mandatory *ex parte* process to veto the parental right to participate in, or even know of, this critical event in their child's life is, in essence, to eliminate the parental right totally in this area.

It is submitted that the proper balance to be struck is that neither "right" be accorded absolute veto over the other. Such a balanced accommodation among potentially competing "rights" can only be struck by providing parents, at very least, reasonable notice that the issue is pending. In no other area that comes to mind has the rebuttable general presumption of parental care been so reversed by judicial decree as to categorically deny even reasonable notice to parents before "the experts" take irrevocable action "in the best interests" of the child.

If it were found true, as Plaintiffs assert, that the Minnesota scheme has not been as successful as might be hoped in furthering parental involvement both in the abortion decision itself and in addressing the circumstances which led to it and the medical and emotional consequences which may flow from

it, it does not follow that the fault lies in the notice element of the system. Rather, it seems reasonable to look also to the *ex parte* process for avoiding notice—particularly if some judges are wont to view their function as a mere "rubber stamp" for decisions already made by others.[5]

III. THE DISTRICT COURT ERRED IN HOLDING THAT A STATE MAY NOT CONSTITUTIONALLY REQUIRE A PHYSICIAN TO ATTEMPT WITH REASONABLE DILIGENCE TO NOTIFY THE PARENTS OF AN UNEMANCIPATED MINOR WOMAN UNDER THE AGE OF 18 AT LEAST 48 HOURS BEFORE PERFORMING AN ABORTION, IF THE NOTICE REQUIREMENT MAY BE AVOIDED BY A COURT BYPASS SYSTEM WHICH BOTH ON ITS FACE AND IN ACTUAL PRACTICE MEETS THE STANDARDS SET FORTH BY THIS COURT FOR MORE BURDENSOME PARENTAL CONSENT STATUTES.

The district court properly concluded, in light of the fact that Minnesota's statute complies both on its face and in practice with the principles set forth by this Court in *Bellotti II*, *H. L. v. Matheson*, 450 U.S. 398 (1981), and *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983), that the challenge to the statute as a whole must be rejected.[6] This determination should have concluded the matter. However, the court curiously then proceeded to enjoin the statute as a whole upon determining that two features of the *notice* element of the notice/bypass system (the 48-hour waiting period and the two-parent notice requirement) were unduly burdensome.

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[5] *See* Final Order, Hodgson Appendix at 69a-70a.

[6] Final Order, Hodgson Appendix at 120a.

In the first place the supposed bases for these conclusions concerning the waiting period and two-parent notice are difficult to comprehend in view of this Court's indication that, in general, states may require two-parent *consent* to minor abortions so long as, in so doing, the states do not permit unreasonable parental veto of the decision. Nothing in Minnesota's two-parent, 48-hour notice requirement nor in the trial court's findings comes close to providing a parental veto even in the case of "disinterested," "absent" or "unhelpful" parents or those who may, for any reason, believe that abortion is not in the best interests of their child.

Even if the length of notice or the notice to both parents could, in some instances, be seen to pose an unnecessary "burden," however, the trial court plainly erred in striking down those aspects of the statute and the complete notice/bypass system for that reason alone.

If it is to be the case that an *ex parte* judicial bypass alternative is a constitutionally required element to a parental notification requirement, this can only be because this Court believes that the notice requirement is, standing alone, occasionally unduly burdensome upon the abortion decision. Thus it is utterly anomalous for the trial court to conclude that the notification/bypass system is unconstitutional because, in some instances, exemptions should be made from the notice requirement. It is indeed only that assumption which could support the necessity of a bypass option in the first place. The district court's determination that the entire notice/bypass system must be invalidated, despite its facial and practical compliance with the standards set forth by this Court, because of the supposed need for situational relief from the 48-hour, two-parent *notice* requirement, stands in direct contradiction to this Court's formulations in *Bellotti v. Baird*,

443 U.S. 622 (1979) and *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983).

IV. IF THE REQUIREMENT THAT BOTH PARENTS BE NOTIFIED ABSENT A JUDICIAL DETERMINATION RENDERS THE MINNESOTA STATUTE UNCONSTITUTIONAL, THE DISTRICT COURT ERRED IN HOLDING THAT REQUIREMENT NOT SEVERABLE FROM THE REMAINDER OF THE STATUTE CONTRARY TO THE EXPRESS INTENT OF THE LEGISLATURE.

In its determination to enjoin the Minnesota notice/bypass system in its entirety, the district court severed the 48-hour notice feature, but held the two-parent notice requirement non-severable. The clear intent of the Minnesota legislature is expressly to the contrary. *See* Minn. Stat. § 144.343, subd. 7 (1984), which unequivocally says:

> If any provision, word, phrase or clause of Laws 1981, Chapter 228 or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of Laws 1981, Chapter 228 which can be given effect without the invalid provision, word, phrase, clause or application, and to this end the provisions, words, phrases, and clauses of Laws 1981, Chapter 228 are declared to be severable.

Given this explicit direction, it is crystal clear that if, indeed, the requirement that notification of both parents should be attempted renders the statute invalid, the legislative intent is that at least one parent should be notified. For the trial court to *wholly* frustrate the legislature upon the assertion that severance of the two-parent language leaves the statute with-

out definition or unenforceable simply ignores the legislative direction. The legislative purpose may clearly be preserved in part by excising statutory language from Minn. Stat. § 144.-343, subd. 3, as follows:

> For purposes of this section, "parent" means (*both parents of the pregnant woman if they are both living,*) one parent of the pregnant woman (*if only one is living or if the second one cannot be located through reasonably diligent effort*), or the guardian or conservator if the pregnant woman has one.
> (italicized wording to be severed)

Where, as here, the legislature has clearly stated its intention, and elimination of the requirement that a second parent be notified does not destroy the functioning of the remainder of the statute, severance is clearly permitted. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, ——, 105 S. Ct. 2794, 2803 (1985).

CONCLUSION

For the foregoing reasons Conditional Cross-Petitioners respectfully urge that, if certiorari is granted in *Hodgson v. State* (No. 86-882) before judgment in the court of appeals, the Court grant full review of all issues raised by Defendants in the court of appeals.

Respectfully submitted,

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